

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOM NORMAN,

Defendant-Appellant.

UNPUBLISHED

September 27, 2002

No. 238508

Genesee Circuit Court

LC Nos. 00-006635-FC

00-006749-FC

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals by leave granted his plea-based convictions of two counts of bank robbery, MCL 750.531, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of fifteen to fifty and seventeen to fifty years' imprisonment for the bank robbery convictions and two years' imprisonment for the felony-firearm conviction. We vacate defendant's sentences for the bank robbery convictions and remand for resentencing.

Defendant's sole claim on appeal is that his minimum sentences, which represent more than a twofold increase from the maximum minimum sentence under the sentencing guidelines range, is invalid because the trial court improperly based its departure from the sentencing guidelines on subjective factors. We agree that the trial court failed to articulate substantial and compelling reasons to justify the upward departure from the sentence guidelines range of thirty-six to eighty-eight months' imprisonment. MCL 777.64.

A trial court must impose a minimum sentence within the sentencing guidelines unless the court finds substantial and compelling reasons to depart from the guidelines. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 437, 439; 636 NW2d 127 (2001); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). The court must state on the record its reasons for departure. MCL 769.34(3); *Armstrong, supra*. Substantial and compelling reasons are to be found only in exceptional cases. *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995); *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). The reasons should grab the court's attention and should be recognized as being of considerable worth in deciding the length of the sentence. *Id.* Factors already considered by the guidelines may not be used to justify a departure unless the court finds that the characteristic has been given inadequate weight. *Id.* at 79.

Appellate courts review for clear error the existence or nonexistence of a particular factor supporting a departure from the guidelines. *Babcock, supra* at 75-76. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. *Id.* at 76. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion. *Id.*

The trial court's stated reasons for departing from the sentencing guidelines were: (1) that defendant has served a previous prison term, (2) the eleven-day time span between the two robberies, (3) the possible nightmares that the bank customers and employees suffered because defendant "terrorized" them during the robbery, (4) the court's desire to send a message that such conduct is intolerable, (5) the protection of the community, and (6) the sentencing guidelines are ineffective because they do not deter crime. We conclude that the trial court's stated reasons for departing from the sentencing guidelines are insufficient to justify the upward departure.

Defendant's criminal history was already taken into consideration in calculating defendant's minimum sentence under the guidelines. The sentencing guidelines addressed defendant's prior felony and misdemeanor convictions in prior record variables (PRV) 1 and 5, which considered defendant's prior low severity felony convictions and misdemeanor convictions, respectively. MCL 777.52; MCL 777.55. Additionally, the trial court improperly considered the eleven-day time span between the bank robberies because this factor was covered by the guidelines in offense variable (OV) 13, which addressed defendant's continuing pattern of criminal behavior. MCL 777.43. Although the prosecution emphasizes that defendant used "guns" to commit the charged offenses, OV 1 and OV 2, which considered the aggravated use of a weapon and the lethal potential of defendant's weapon, encompassed this factor. MCL 777.31; MCL 777.32.

Further, the trial court's consideration of the "possible nightmares" that the bank customers and employees may have had was not a proper basis for departure because the guidelines considered psychological injury to victims, and because it fails to meet the "objective and verifiable" standard required to justify a departure from the sentencing guidelines. MCL 777.34; see also *Babcock, supra* at 75. Objective and verifiable factors are those "actions or occurrences which are external to the minds of the judge, defendant and others involved in making the decision . . . [that are] capable of being confirmed." *Fields, supra* at 66. Accordingly, whether any of the bank customers or employees experienced post-robbery trauma was a subjective factor improperly considered by the trial court absent a psychological impact statement from victims. Also, the goal of deterrence is subjective with regard to the impact of defendant's sentence on future criminal conduct, and the need to protect the public is a factor incorporated into the guidelines as a whole, MCL 769.33(1)(e)(i). See *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). In sum, these factors were improperly considered to justify an upward departure without an articulation by the trial court of how the characteristics or factors were given inadequate weight by the sentencing guidelines. *Babcock, supra* at 75.

On remand, the prosecution is free to seek an upward departure from the sentencing guidelines range, and the trial court may depart if it finds and articulates proper reasons for doing so.¹ Defendant requests resentencing before a different judge. Because the reason for resentencing is based on the trial court's erroneous application of the law, and the record contains no evidence of actual bias or prejudice against defendant, we find it unnecessary to require resentencing before a different judge. *Hegwood, supra* at 440-441 n 17; *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

We vacate defendant's bank robbery sentences and remand for resentencing for these offenses. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder

¹ We note that other factors not considered by the trial court may support a departure from the sentencing guidelines: The prosecution dismissed other charges against defendant pursuant to the plea agreement. Also, defendant was in possession of a gun at the time he was arrested. Further, two stolen cars were used as getaway cars in the robberies and defendant's stated reason for committing the bank robberies was his \$15,000 debt to a drug dealer.